Sivarasa Rasiah v Badan Peguam Malaysia & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–01–55 OF 2001

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND MOHD SAARI JJCA

29 JANUARY 2002

Civil Procedure *— Judicial review — Stay of proceedings pending judicial review — Effect of O 53 Rules of the High Court 1980 — Application for judicial review dismissed based on procedural grounds — Whether O 53 should be read restrictively — Whether trial judge should dismiss application for judicial review based on technical and procedural grounds alone — Courts of Judicature Act 1965 Schedule para 1*

The appellant was an advocate and solicitor. On 14 July 2001, he became the Vice President of a political party. As a member of the Bar, he was entitled to be elected to the executive arm of the Malaysian Bar, namely, the Bar Council. In fact he was elected to the Bar Council for year 2001–2002. But s 46A of the Legal Profession Act 1976 disqualified him from holding office. The appellant was dissatisfied with this statutory disqualification. This appeal was directed against the order of the High Court dismissing the appellant's application for leave to apply for judicial review and his failure was based wholly on procedural grounds. The applicant applied for leave to move for judicial review; for among others, that his purported disqualification from continuing in office as member of the Bar Council 2001–2002 and offering himself as a candidate for election to the Bar Council 2002–2003 and in subsequent years be stayed pending the final determination of these proceedings pursuant to O 53 r 3(5) of the Rules of the High Court 1980 ('the RHC') and/or under the inherent jurisdiction of this court.

Held, allowing the appeal:

(1) The appellant was entirely correct in invoking the provision of O 53 of the RHC. It must not be forgotten that O 53 of the RHC in its present form was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. Two points may be noted when considering the present O 53 of the RHC. First, that it began by referring to the powerful and enabling provision introduced for the first time in the law by Parliament in para 1 of the Courts of Judicature Act 1964 ('the CJA'). Secondly, a rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice. In the present case, a manifest injustice would occur if O 53 of the RHC was read restrictively so as to permit an applicant to claim a declaration only where he applied for it jointly with some other remedy (see p 420A–B, G–H).

(2) Under para 1 of the Schedule to the CJA, the courts had power to issue such orders and grant such relief as was appropriate to the

particular circumstances of a given case. Since the High Court had ample power and jurisdiction to grant appropriate relief after hearing full argument on the substantive motion, the point about the motion paper suffering from inadequacies of drafting, justifiably made in present case, came to naught. If the applicant had asked for remedies which he was patently not entitled to, but adduced facts and established grounds entitling him to relief, it was of course open to the judge hearing the substantive motion to invite arguments on the grant of relief appropriate to the applicant's factual situation (see pp 420I, 421H–I).

Obiter:

The court expressed its disappointment that in this day and age, applications and suits were disposed of on purely technical and procedural ground without even slightest attempt to ensure that justice according to the merits of a particular case was done. The court should not forget its duty to do justice according to law and the substantial merits of each case (see p 422C–D).

[**Bahasa Malaysia summary**

Perayu adalah seorang peguambela dan peguamcara. Pada 14 Julai 2001, beliau menjadi Timbalan Presiden sebuah parti politik. Sebagai seorang ahli Badan Peguam, beliau berhak untuk dilantik sebagai eksekutif Badan Peguam Malaysia, iaitu Majlis Peguam bagi tahun 2001–2002. Tetapi s 46A Akta Profesyen Undang-undang 1976 tidak melayakkan beliau untuk menyandang jawatan tersebut. Perayu tidak berpuashati dengan ketidak-layakan statutori ini. Rayuan ini ditujukan terhadap perintah Mahkamah Tinggi yang menolak permohonan perayu untuk kebenaran bagi memohon untuk mendapatkan kajian semula kehakiman dan kegagalan beliau adalah semata-mata atas alasan prosedur. Pemohon telah memohon untuk kebenaran bagi mengusul untuk kajian semula kehakiman; bagi antara lainnya, bahawa ketidak-layakan beliau yang dikatakan daripada terus memegang jawatan sebagai ahli Majlis Peguam 2001–2002 dan menawarkan dirinya sebagai calon untuk pemilihan ke Majlis Peguam 2002–2003 dan dalam tahun-tahun yang berikut hendaklah digantung sementara menantikan penentuan muktamad prosiding-prosiding ini selaras dengan A 53 k 3(5) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau di bawah bidang kuasa sedia ada mahkamah ini.

Diputuskan, membenarkan rayuan tersebut:

(1) Perayu adalah sesungguhnya betul dalam menggunakan peruntukan A 53 KMT. Adalah tidak harus dilupakan bahawa A 53 KMT dalam bentuk semasanya telah diperkenalkan untuk memulihkan kerosakan gejala yang terdahulu, yang mana adalah

lebih kecil dan terhad. Dua perkara harus diperhatikan ketika menimbangkan A 53 KMT. Pertamanya, ia bermula dengan merujuk kepada 'enabling provision' yang telah diperkenalkan buat pertama kalinya dalam undang-undang oleh Parlimen dalam perenggan 1 Akta Mahkamah Kehakiman 1964 ('AMK'). Keduanya, kaedah mahkamah tidak seharusnya ditafsirkan menurut cara yang menyebabkan ketidakadilan atau menghasilkan ketidakadilan yang nyata. Dalam kes semasa, ketidakadilan yang nyata akan berlaku jika A 53 KMT dibaca secara terhad hinggakan membenarkan pemohon untuk menuntut satu pengisytiharan hanya di mana beliau memohon bagi mendapatkannya secara bersesama dengan remedi lain (lihat ms 420A–B, G–H).

(2) Di bawah perenggan 1 Jadual kepada AMK, mahkamah-mahkamah mempunyai kuasa untuk mengeluarkan perintah sedemikian dan memberikan relief sedemikian seperti mana yang berpatutan dengan keadaan-keadaan tertentu kes yang dinyatakan. Oleh kerana Mahkamah Tinggi mempunyai kuasa yang secukupnya dan bidang kuasa untuk memberikan relif yang berpatutan selepas mendengar hujahan sepenuhnya atas usul yang substantif, perkara mengenai kertas usul yang tidak diderafkan dengan secukupnya, yang secara wajarnya di dalam kes semasa, menjadi sia-sia sahaja. Jika pemohon telah memohon untuk mendapatkan remedi yang mana beliau jelas tidak berhak untuk mendapatnya, tetapi mengemukakan fakta-fakta dan menentukan alasan-alasan yang memberikan beliau hak kepada relif ia adalah tentu sekali terpulang kepada hakim yang mendengar usul substantif itu untuk mempelawa hujahan atas pemberian relif yang wajar kepada situasi faktual pemohon (lihat ms 420I, 421H–I).

Obiter:

Mahkamah kecewa bahawa pada zaman dan hari ini, permohonan-permohonan dan guaman-guaman dilupuskan semata-mata atas alasan teknikal dan prosedur tanpa percubaan sedikit pun untuk memastikan bahawa keadilan menurut merit sesuatu kes tertentu dilaksanakan. Mahkamah tidak harus lupa tugasnya untuk melaksanakan keadilan menurut undang-undang dan merit substansial setiap satu kes (lihat ms 422C-D).]

Notes

For cases on judicial review generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3622–3623.

Cases referred to

Bank of America National Trust and Savings Associations v Chai Yen [1980] 1 MLJ 198 (refd)

Boddington v British Transport Police [1998] 2 WLR 639 (refd)
British Steel plc v Customs & Excise Commissioners [1997] 2 All ER 366 (refd)
Dwarka Nath v Income Tax Officer AIR 1966 SC 81 (refd)
Heywood v Hull Prison Board of Visitors [1980] 3 All ER 594 (refd)
Mohamed Nordin bin Johan v Attorney General, Malaysia [1983] 1 MLJ 68 (refd)
O'Reilly v Mackman [1982] 3 All ER 1124 (refd)
PJ Irani v State of Madras AIR 1961 SC (refd)
Pawlowski v Dunnington [1999] STC 550 (refd)
Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (refd)
Steed v Secretary of State for the Home Department [2000] 3 All ER 226 (refd)
Tillmire Common, Heslington, Re [1982] 2 All ER 615 (refd)
Trustees of the Dennis Rye Pension Fund & Anor v Sheffield City Council [1997] 4 All ER 747 (refd)
Wandsworth London Borough Council v Winder [1985] AC 461 (refd)

Legislation referred to

Indian Constitution art 226
Courts of Judicature Act 1964 para 1
Courts Ordinance 1948
Federal Constitution Part II
Legal Profession Act 1976 s 46A

Rules of the High Court 1980 O 15 r 16, O 53 r 3(5)

Appeal from: Application for Revision of Judgment No R2–25–83 of 2001 (High Court, Kuala Lumpur)

Tommy Thomas (*Tommy Thomas*) for the appellant.
Cyrus Das (*Bastian Vendargon* and *Hamid Sultan Abu Bakar* with him) (*Hamid Sultan & Rakan-Rakan*) for the first respondent.
Abdul Aziz Abdul Rahim (Senior Federal Counsel) (*Alice Loke* with him) (Federal Counsel) for the second respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This appeal is directed against the order of the High Court dismissing the appellant's application for leave to apply for judicial review. The Malaysian Bar (the first respondent before us) does not oppose this appeal, but the Government of Malaysia (the second respondent) does. The facts relevant to the present appeal lie within a narrow compass.

The appellant is an advocate and solicitor. On 14 July 2001, he became the Vice President of a political party. As a member of the Bar, he is entitled to be elected to the executive arm of the Malaysian Bar, namely, the Bar Council. In fact, he was elected to the Bar Council for year 2001–2002. But

A s 46A of the Legal Profession Act 1976, disqualifies him from holding office. That section reads as follows:

> A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee:
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> (a) unless he is and has been an advocate and solicitor for a period of not less than seven years, or for periods which in the aggregate amount to not less than seven years; or
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> (b) if he is a member of either House of Parliament, or of a State Legislative Assembly, or any local authority; or
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> (c) if he holds any office in:
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> (i) any trade union; or
>
> (ii) any political party; or
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> (iii) any other organisation, body or group of persons whatsoever, whether or not it is established under any law, whether it is in Malaysia or outside Malaysia, which has objectives or carries on activities which can be construed as being political in nature, character or effect, or which is declared by the Attorney General by order published in the *Gazette*, to be an organisation, body or group of person which has such objectives or carries on such activities.
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> (2) An order made by the Attorney General under para (c)(iii) of sub-s (1) shall not be reviewed or called in question in any court.
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> (3) Where a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council of a Bar Committee, becomes disqualified under sub-s (1), he shall immediately thereupon be deemed to have vacated his membership thereof and any office that he may hold therein.

The appellant was dissatisfied with this statutory disqualification. He wished to challenge it. He applied for leave to move for judicial review. The relief he claimed in his written application is as follows:

> (1) That the applicant be granted leave to apply for a Declaration that, notwithstanding the applicant's appointment as Vice President of Parti Rakyat Malaysia on 14 July 2001, the applicant is not disqualified from being a member of the Bar Council 2001–2002.
>
> (2) That the applicant be granted leave to apply for a Declaration that, notwithstanding the applicant continuing to hold the office of Vice President of Parti Rakyat Malaysia, the applicant is not disqualified from offering himself as a candidate for election to the Bar Council 2002–2003 and in subsequent years;
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> (3) That the purported disqualification of the applicant from continuing in office as member of the Bar Council 2001–2002 and offering himself as a candidate for election to the Bar Council 2002–2003 and in subsequent years be stayed pending the final determination of these proceedings pursuant to O 53 r 3(5) of the Rules of the High Court, 1980 and/or under the inherent jurisdiction of this Honourable Court; and
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> (4) That all necessary and consequential directions and orders be given.

The grounds upon which he claimed that relief appear in his statutory statement, filed in support. These are the grounds:

(a) Section 46A of the Act ('the said provision') in purporting to:
   (i) disqualify the applicant from being a member of the Bar Council 2001–2002;
   and
   (ii) disqualify the applicant from offering himself as a candidate for election by postal ballot in October/November 2001 for membership of the Bar Council 2002–2003 and in subsequent years

   is unconstitutional by reason of the breach of the fundamental rights of the applicant entrenched in Part II of the Federal Constitution;

(b) The said provision is contrary to the applicant's right to freedom of association enshrined in art 10(1)(c);

(c) The said provision is in breach of the equality provisions of art 8(1);

(d) The said provision results in unfair discrimination of the applicant contrary to the art 8(2);

(e) The said provision has the effect of depriving or impinging on his personal liberty contrary to art 5(1); and

(f) The applicant's said fundamental freedoms are directly affected or the effect or consequence on the said fundamental rights by the said provision is to make their exercise ineffective or illusory because the applicant is not permitted to hold the office of Vice President, Parti Rakyat Malaysia and the office of member of the Bar Council simultaneously.

But, as I said a moment ago, the applicant failed in his application and his failure was based wholly on procedural grounds. The second respondent raised two objections in the court below which found favour with the learned judge. They have been repeated before us. However, under pressure of argument, counsel, who had taken extreme positions on their respective cases, were forced to concede ground on both sides, so that the issue now before us is much narrower than it was before the learned judge. I may also add in fairness to the learned judge that the authorities read to us were not drawn to his attention. After the dust of argument had settled by this morning, it is apparent, quite clearly, where the difference of opinion lies between the applicant and the second respondent.

Dato' Aziz, learned Senior Federal Counsel with his usual frankness, put it very neatly. He says that his objection really is, that the declarations sought by the applicant's written application cannot be granted, even if the applicant is right. They are not declarations, he correctly points out, that make a frontal assault upon the constitutionality of s 46A. They are merely declarations which, even if the facts alleged are proved, cannot be granted. The case is therefore frivolous and vexatious and hence meets the test laid down by an unusually strong Federal Court in *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68.

Mr Thomas' response to this argument is that the objection taken is premature. This, together with any other points already taken at the leave stage are really matters that ought to be considered and dealt with at the hearing of the substantive motion which is yet to be filed.

These arguments of counsel on either side bring into sharp focus the divide between private and public law remedies. In England, where the judicial review provisions are in some respects similar to ours while differing materially in the other respects, cases have gone in both directions. Thus, in *Re Tillmire Common, Heslington* [1982] 2 All ER 615, at pp 621–622 Dillon J (as he then was) following the judgment of Goulding J in *Heywood v Hull Prison Board of Visitors* [1980] 3 All ER 594, pointed to the ill-advisedness of invoking the general provision governing declaratory relief in O 15 r 16 of the RHC in cases of public law. The English Courts, at that stage, were very concerned that a litigant instead of taking on the heavier burden imposed by O 53 of the RHC may attempt to by-pass that rule of court by taking advantage of the less onerous and more generous private law provision in O 15 r 16 of the RHC. Even a cursory reading of the judgments in cases I have just referred to as well as speech of Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 make this concern clear.

I have thus far mentioned cases going the one way. There are several cases going in the opposite direction. I need only mention one of these. It is a decision of critical importance to English practitioners. But it also provides us much needed guidance when construing our own O 53 which is comparatively new. The case I refer to is *Trustees of the Dennis Rye Pension Fund & Anor v Sheffield City Council* [1997] 4 All ER 747. The principal judgment was delivered by Lord Woolf MR, now Lord Chief Justice the acknowledged authority on modern civil procedure and administrative law in the Commonwealth. There are two passages in his judgment that merit reproduction. The first appears at p 754 where he said this:

> … What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly v Mackman*. This guidance involves recognizing: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available on private law proceedings (namely the requirement of leave and the protection against delay).

The second passage appears at p 755. It reads:

> … If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary for *purely procedural reasons* to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.

These observations of Lord Woolf were approved without qualification by a unanimous House of Lords in *Steed v Secretary of State for the Home Department* [2000] 3 All ER 226. A

Acting on this guide, it is my view that in the present case the appellant was entirely correct in invoking the provision of O 53 of the RHC. It must not be forgotten that O 53 of the RHC in its present form was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. Two points may be noted when considering our present O 53 of the RHC. First, that it begins by referring to the powerful and enabling provision introduced for the first time in our law by Parliament in para 1 of Courts of Judicature Act 1964 ('the CJA'). Pausing for a moment, let me remind myself of the historical background against which para 1 was enacted. B C

Until 1964, the statute that governed the judicial arm of Government was the Courts Ordinance 1948 ('the Ordinance'). That Ordinance was passed by our colonial masters under whose yoke we lived until 31 August 1957. On 31 August 1957, we inherited a dynamic Federal Constitution ('the Constitution') which conferred upon our citizens some of the most cherished and valuable rights that any human being can aspire for. Among these are the fundamental liberties enshrined in Part II. It was obvious to the meanest of intelligence that in the face of such a dynamic document the outdated, archaic and arcane provisions of a medieval society that fashion remedies to meet its needs were wholly inappropriate. Of what use to us are such ancient self-fettering remedies like certiorari, quo warranto and the like? Something had to be done to bring federal law in line with dynamism of the Constitution. And so Parliament acted. It repealed the Ordinance and replaced it with the CJA into which it incorporated para 1 conferring upon our High Courts powers much wider than those vested in Queens Bench Division in England. But our courts were limping behind Parliament in the procedural sector. We still clung on to the shackles and fetters imposed upon us by English adjectival law. We forgot all about para 1. And then finally, the Rules Committee acted to keep in tandem with CJA. Accordingly, O 53 of the RHC, in its present form was introduced. D E F G

To return to the construction to be given to O 53 of the RHC, I turn to the second point I wish to make. It is the principle which governs the construction of rules of courts. A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice: *Bank of America National Trust and Savings Associations v Chai Yen* [1980] 1 MLJ 198; *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292. So here, a manifest injustice would occur if O 53 of the RHC is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy. H

I might add that under para 1 of the Schedule to the CJA, which is drawn from art 226 of the Indian Constitution and to which in material parts it is identical, our courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case. I

Support for this view may be found in the decision of the Indian Supreme Court in *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81, where at p 84, I find Subba Rao J, saying this after reproducing art 226:

> This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice whenever it is found. The Constitution designedly used wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but also draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under art 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small county like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Such limitations are implicit in the article and others may be evolved to direct the article through defined channels.

Reference may also be made to *PJ Irani v State of Madras* AIR 1961 SC, where Ayyangar J said at p 1738:

> We do not consider that immunity from interference by the Courts could be sought for orders which are plainly ultra vires merely because they were passed bona fide in the sense of being without indirect motive. Particularly so when the power of High Court under art 226 of the Constitution is not limited to the issue of writs falling under particular groupings, such as the certiorari, mandamus, etc, as these writs have been understood in England, but the power is general to issue any direction to the authorities, viz, for enforcement of fundamental rights as well as for other purposes.

Counsel before us stand upon the common ground that if there is any conflict between O 53 of the RHC and para 1 of the CJA, the latter should prevail. Again, Dato' Aziz, Senior Federal Counsel, with his customary frankness concedes that even without O 53 of the RHC, our courts can issue declarations in public law cases because of the wide powers conferred by para 1 of the CJA.

Since the High Court has ample power and jurisdiction to grant appropriate relief after hearing full argument on the substantive motion, the point about the motion paper suffering from inadequacies of drafting, justifiably made in present case, comes to naught. If the applicant has asked for remedies which he is patently not entitled to, but adduces facts and establishes grounds entitling him to relief, it is of course open to the judge hearing the substantive motion to invite arguments on the grant of relief appropriate to the applicant's factual situation. I must therefore with all the respect, I can gather for Dato' Aziz, reject his argument.

However, in fairness to learned senior federal counsel, there is one other matter which I am obliged to address. As I said, Dato' Aziz has correctly pointed out that this is not a case of collateral attack as suggested by Mr Thomas with some diffidence in a weak argument by way of a side wind when he opened the appeal. A genuine collateral attack is usually taken by way of defence. The pages of de Smith, Woolf & Joel on *Judicial Review* (5th Ed) are replete with such cases. I need only mention three in passing. They are *Wandsworth London Borough Council v Winder* [1985] AC 461 (see in particular speech of Lord Fraser of Tullybelton at pp 508– 509); *Pawlowski v Dunnington* [1999] Simon Tax Cases 550 (the judgment of Simon Brown LJ), both examples of collateral attack in civil proceedings, and *Boddington v British Transport Police* [1998] 2 WLR 639, an example of collateral attack in criminal proceedings. At the risk of repetition, the present appeal is not a case of collateral attack.

For myself, I must add a final word. I must be forgiven for expressing my amazement and equal disappointment that in this day and age, applications and suits are disposed of on purely technical and procedural ground without even slightest attempt to ensure that justice according to the merits of a particular case is done. I cannot help feeling that somewhere in the performance of our duty as judges to decide according to law we have forgotten our duty to do justice according to law and the substantial merits of each case. My own feelings are so well expressed by Saville LJ (now Lord Saville) in *British Steel plc v Customs & Excise Commissioners* [1997] 2 All ER 366, at p 379 that I need only what he said:

> These proceedings have to date been concerned with the question whether British Steel plc used the correct form of action in which to make the claim for repayment of excise duty from the Commissioners of Customs and Excise.
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> It is now well over 100 years ago that our predecessors made a great attempt to free our legal process from concentrating upon the form rather than the substance, so that the outcome of cases depended not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties.
>
> The old forms of action have doubtless long been laid to rest, but others have sprung up in their place, giving rise once again to litigation which is devoted to the question whether the right form of action has been used, rather than addressing and resolving the real dispute between the parties.
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> The present proceedings are of these nature, for the question is whether the claim is properly brought by ordinary action or should first have been advanced by way of judicial review. The question is of vital importance, for under our rules of procedure it is now too late to adopt the latter form of action, while if the wrong form is chosen, it is categorized as an abuse of the process.
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> This is only the most recent such case, for over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the most sophisticated arguments, such as the distinction and difference between what is described as 'public' as opposed to 'private' law, whether rights are of a 'private' or 'public' nature, whether 'private' rights depend upon the exercise of 'public' obligations and so on: as well as seeking to decide, in the context of legislation

which does not make the position clear, whether or not Parliament did or did not intend to limit or exclude rights that might otherwise exist under Common law. The cost of this litigation, borne privately or through taxation, must be immense, with often the lawyers the only people to gain.

Such litigation brings the law and our legal system into disrepute; and to my mind correctly so. It reinforces the view held by the ordinary person that the law and our legal system are slow, expensive and unsatisfactory. In this day and age it is surely possible to devise procedures which avoid this form satellite litigation, while safeguarding both the private rights of individuals and companies and the position and responsibilities of public authorities.

For the reasons already given, this appeal is allowed. The order of the learned judge refusing leave and dismissing the application *in limine* is set aside. The applicant is granted leave to apply for judicial review. My learned brothers and I are conscious of the jurisdiction we have, when granting leave, to hear the substantive motion on a formal undertaking to file the same (see *Mohamed Nordin bin Johan v Attorney General, Malaysia*). But as pointed out by Dato' Aziz and conceded by Mr Thomas, that jurisdiction ought not to be exercised in the present instance. There are important questions of constitutional interpretation upon which this court must have the benefit of the primary judge. Accordingly we make the consequential order that the applicant shall have 14 days from today within which to deliver his substantive motion before the High Court. The applicant shall also reserve his affidavit and statutory statement on both the Attorney General's Chambers and Bar Council. The deposit is refunded to the applicant. By consent, there is no order as to costs here and below.

This is the first time this court is dealing with the new O 53 of the RHC. It is important that the profession knows soonest possible our views upon the subject at hand. Hence, this *ex tempore* judgment. My learned brothers concur with the result and reasoning I have just expressed. We wish to thank counsel on both sides for their assistance without which it would not have been possible for us to deliver this *ex tempore* judgment.

Appeal allowed.

Reported by Peter Ling